IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No. 628 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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PRAGNABEN MAHESHBHAI JOSHI - Applicant(s)
Versus
THE STATE OF GUJARAT & 4 - Respondent(s)

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Appearance :
MR MRUGEN K PUROHIT for Applicant(s) : 1,
PUBLIC PROSECUTOR for Respondent(s) : 1,
MR JAGDISH H MEHTA for Respondent(s) : 2 - 5.

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CORAM : HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 02/08/2007

ORAL JUDGMENT

1. The applicant has preferred this Revision Application under section 397 read with section 401

of Criminal Procedure Code 1973 and challenged the order passed by learned Sessions Judge Junagadh in Criminal Misc. Application No. 159/06 on 29.4.06 transferring all the matters pending between the parties from the Court of JMFC, Visavadar to the Court of 5th Joint Addl. Civil Judge and JMFC Court, Junagadh.

2. The applicant is the wife of respondent No. 2, respondent No. 3 is her father in law and respondent No. 4 is her mother in law, respondent No. 5 is her sister in law. On the basis of complaint filed by the applicant before Visavadar police station for the offence punishable under section 498 A, 420, 406 I.P Code and section 3,7 of Dowry Prohibition Act, offence was registered and investigation was started. On completion of investigation charge sheet was laid before the court of JMFC for the aforesaid offences and criminal case NO. 15/97 came to be registered by the Court. According to the applicant the respondents have made efforts to delay the proceedings but the court was strict in granting adjournments on frivolous grounds which was disliked by the respondents and their advocates. The court started recording of evidence by recording examination in chief of the applicant and the matter was kept for cross-examination on 12.4.06 but the respondent No. 2 tried to interfere with the judicial process. Therefore learned Magistrate requested him not to interfere with the judicial

process. The respondents wanted to avoid the hearing. Therefore Criminal Misc. Application No. 159/06 was filed by the respondent No. 2 to 5 for transfer of the case, before Learned Sessions Judge, Junagadh contending that alleged offence was not committed at Visavadar, therefore the Court had no jurisdiction to try the offence but the said application was rejected by the Court and therefore Special Criminal Application No. 623/07 was filed before the High Court; and thereafter the case was referred to permanent Lok Adalat by the High Court that the same was returned to the Court as the complainant did not appear and the same was pending before the High Court; that in March 2006 the case was fixed for hearing but the application for adjournment was made as the Special Criminal Application was pending before the High Court; thereafter the case was fixed on 12.4.06 and the respondents applied for adjournment giving details about the case pending before the High Court but the learned Magistrate got enraged and returned the application and instructed them to give simple application, therefore, simple application for adjournment was given; that despite that the Court recorded disposition of the complainant; that respondent No. 2 and his advocate requested the Court but learned Magistrate insulted them; that normally a bench for accused is being kept in frontside so that they can hear recoding of evidence but respondent No. 2 was asked to sit on the back side and when junior advocate asked

respondent No. 2 to sit at that place, Learned Magistrate got enraged, and scolded his advocate and also asked for his explanation; that the Court also informed the advocate that he was interfering with the administration of justice and a complaint would be filed against him, therefore, the advocate tendered apology, despite that learned magistrate insulted him and told him to cross-examine the witness and informed that otherwise exemption granted to the respondent No. 2,4, and 5 would be cancelled but the case was adjourned when application was submitted; that the complainant and her advocate were encouraged on account of conduct of learned magistrate and complainant and her father gave threats to respondent No 2 after the case was adjourned and therefore they apprehend that false cases would be filed against them; that considering the conduct of learned magistrate they feel that they would not get fair trial on account of the incident therefore the case is required to be transferred to some other Court.

3. The learned Sessions Judge called for remarks of concerned Magistrate and was pleased to allow the application of transfer by his order dated 29.6.06 and therefore this Revision Application has been filed challenging the order of transfer of all the cases between the parties.

4. I have heard learned advocate Mr. Purohit for the applicant and learned counsel Mr. Lakhani

for learned advocate Mr. Jagdish Mehta for respondent No. 2 to 5 and learned APP Ms Archana Raval for State at length and in great detail.

5. It appears from the record and proceedings of Criminal Misc Application No. 159/06 that learned Sessions Judge Junagadh issued notice to the Public Prosecutor and also called for remarks of the concerned court. Pursuant to the said order concerned court submitted its remarks with a confidential letter and learned Sessions Judge after hearing the parties and considering the remarks passed the impugned order.

6. The record and proceedings of Criminal Misc Application No. 159/06 along with the confidential report of concerned learned Judicial Magistrate First Class submitted to learned Sessions Judge were also called for.

7. The Respondent No. 3 on behalf of respondent No. 2 to 5 filed affidavit dated 27.6.07 which is at page 18 of the compilation. The respondent No. 3 has denied the averments made in this application and has also stated that respondents are not responsible for delay as alleged by the applicant but applicant herself has delayed the proceedings. The respondent has made other averments with regard to the proceedings between the parties but they are not relevant for the purpose of deciding this application and therefore they are not reproduced here.

8. Learned advocate Mr. Purohit submitted that the case was pending before the trial court since 1997 and the respondents tried to delay the proceedings by resorting to various methods, however, as they could not succeed, transfer application was moved with a view to further delay the proceedings. He also submitted that as the case was very old learned magistrate was justified in expediting the hearing by refusing to adjourn the case on frivolous grounds and apprehension that accused will not get fair and impartial trial is ill-founded. He also submitted that learned Sessions Judge committed error in passing the impugned order without entering into merits of the case only on the ground that he was aware about nature of advocate representing the respondents and transfer of cases on such ground is not justifiable. He also submitted that though the transfer application was in respect of the complaint filed by the applicant, learned Sessions judge transferred other cases pending in the same court and thereby learned Sessions judge committed error in exercising the jurisdiction vested in him. He also submitted that the grounds for transfer alleged by the respondents in the transfer application are not contemplated under section 408 of the Criminal Procedure Code and if cases are transferred on such grounds it would give wrong signal to the society therefore court should not encourage such practice. He relied upon the

decisions of **Avtarsingh and Ors. Vs State of M.P reported in 1982 (1) SCC 438, in the case of Buniyad and Ors Vs. the State of Rajasthan reported in 1983 (Crimes) page 760, in the case of R. Balakrishna Pillai Vs State of Kerala reported in (2000)7 Supreme Court cases 129, in the case of Abdul Nazar Madani Vs State of T.N and anr reported in (2000) 6 Supreme Court Cases 204.**

9. Learned advocate Mr. Lakhani submitted that learned Magistrate showed unnecessary haste in proceeding with the case by not considering the fact that proceeding was pending before this Court. He also submitted that respondents were not responsible for delay as they availed of legal remedies available to them and therefore it cannot be construed as delaying tactics. He also submitted that relations between the advocate and learned Magistrate did not remain cordial on account of certain exchanges and therefore respondents accused apprehended that they would not get fair trial and concerned Court also submitted remarks that it has no objection if all the cases are transferred to some other court and therefore learned sessions judge was justified in passing the impugned order and hence, no interference is warranted in the impugned order. He relied upon the decisions of **Gurcharan Das Chadha Vs State of Rajasthan reported in AIR 1966 SC 1418, in the decision of Pushpa Devi Saraf Vs. Jai Prakash reported in AIR 1992 SC 1133. In the**

decision of Hon'ble Supreme Court in the case No : APpeal (cri). 321 of 2001 between Rajeshkumar Singh High Court of Judicature of Madhya Pradesh, Bench Gwalior dated 31.5.07 un reported decision of this Court (Coram : H.K Rathod,J) dated 26.6.01 in the matter of Abdul Raoof Alias Raoof, Abdul Kader Shaikh Vs State of Gujarat in Criminal Misc Application 2144/01.

10. Learned APP Ms. Raval supported the applicant and submitted that as no reasoned order has been passed by learned Sessions Judge the order is required to be set aside.

11. Under section 408 of the Criminal Procedure Code 1973, Sessions Judge has power to transfer cases and appeals from one Criminal Court to other Criminal Court in his Sessions Division. It provides that when it is made appear to Sessions Judge that an order to transfer cases is expedient for the ends of justice, the judge may transfer case from one criminal court to other criminal court in his Sessions Division. It also provides that the judge may act either on the report of the lower court or on the application of party interested or on his own initiative. In this case the respondents who were the accused in the criminal case applied for transfer of the case from Visavadar Court to other Court. Therefore now it is required to be examined whether it was expedient for the ends of justice to transfer all the cases

between the parties though prayer was made to transfer only one case.

12. Learned advocate Mr. Lakhani stated at the bar that he does not raise any doubt about the integrity of learned Magistrate conducting the trial. I have gone through the remarks offered by concerned magistrate to Sessions Judge. The learned Magistrate has narrated the sequence of the events that took place during the course of trial and she has also explained that as there was no stay from Superior Court to proceed with the matter, she recorded deposition on 12.4.06. She has also stated that she has no objection if the matter is transferred from her court. She has also stated that there are four proceedings between the same parties pending in her Court.

13. It appears that this Court while issuing rule on 22.12.06 granted ad interim relief in terms of para 14 (c) which should be in fact para 15 (c) with regard to the stay of execution, implementation and operation of the impugned order dated 29.6.06. By the same order, the Court also directed the trial Court to proceed with the cases as if impugned order was not passed at all, as cases were old. In view of this it becomes clear that there was no stay against the proceeding with the cases and on the contrary this court directed the trial court to proceed with the case. Therefore the learned Magistrate was justified in proceeding with the case

as it was old case despite the proceeding pending in this court.

14. As regards contention of causing delay it appears that the respondents resorted to various legal remedies available to them. Therefore submission with regard to delay has no much substance. Now, therefore question to be examined is whether on account of the incident of alleged insult of advocate by learned Magistrate, whether it can be said that the respondents were justified in apprehending that they would not get fair trial and therefore learned Sessions Judge was justified in transferring the case. According to the affidavit Annexure III filed by the learned advocate Mr Jitendra Mohanlal Gatha, the court started recording deposition of complainant despite the fact that application for adjournment was given. Therefore the advocate and respondent No. 2 requested the court, but learned magistrate allegedly, got enraged and insulted him and asked for his explanation as to why he asked his client to sit on the bench. According to the learned advocate, on account of this incident he felt insulted. It appears from the explanation offered by the learned Magistrate that the advocate was warned for his mis-behaviour in the Court. It is duty of a judge to see that dignity and decorum of the Court is maintained and therefore judge has a right to take action against erring advocate. Therefore if an advocate is warned for his mis-behaviour it cannot

be considered as an insult. It also appears that after warning the advocate for his misbehaviour the learned magistrate did not proceed with the case but adjourned the case. It is settled proposition that apprehension of not getting a fair trial is required to be reasonable and not imaginary. Mere allegations of denial of justice is not sufficient. The apprehension must appear to the court to be reasonable, genuine and justifiable. The respondents alleged that learned magistrate informed the respondent and junior advocate Mr Gatha that exemption granted to some of the accused would be cancelled if the witness was not cross-examined. Advocate Mr. Gatha has not stated this fact in his affidavit. Considering this it appears that the respondents did not state correct facts in their transfer application. Therefore apprehension of the respondents of not getting fair and impartial trial was not reasonable, genuine and jutifiable. If matters are transferred on such apprehensions superior courts would be flooded with transfer applications. This cannot be encouraged. Moreover the respondents did not apply for transfer of all the cases but strangely Sessions Judge transferred all the cases between the parties. Therefore, in my view learned Sessions Judge committed error in exercising power conferred upon him under section 408 of the Code. It also appears from the impugned order that one of the reason assigned to transfer the cases was that learned Sessions Judge knew nature of the advocate. This observation can be

interpreted either way. Learned Sessions Judge has also given a reason that transfer is in the interest of justice and parties but has not elaborated them. Section 408 of Code provides that Sessions Judge may transfer case if it is expedient for ends of justice. The order does not indicate that it was expedient for the ends of justice to transfer the case; in the facts and circumstances of the case. In my view learned Sessions Judge committed error in passing the impugned order and therefore the order is perverse and is required to be set aside.

15. As regards contention of threats allegedly given by the complainant and his father and apprehension of filing false cases no submissions are made. Therefore they are not required to be dealt with.

16. In the decision of **R. Balakrishna Pillai Vs State of Kerala reported in (2000)7 Supreme Court cases 129,** relied upon by Mr. Purohit **t**he Hon'ble Supreme Court held that mere allegations by the accused of apprehension of denial of justice is not sufficient and the apprehension must appear to the Court to be reasonable genuine and justifiable and the power of transfer cannot be exercised on hyper sensitive ground or mini grievances. The court further held that if the powers are exercised on such grounds the entire judicial frame would be wrecked. Similarly in the decision of **Buniyad and**

Ors Vs. the State of Rajasthan reported in 1983 (Crimes) page 760; Hon'ble Rajasthan High Court held that Sessions Judge committed error in transferring Session Cases from his Court to another court on the ground that he felt annoyed with certain remarks and observations made by the learned advocate for the petitioner. I**n the decision of Abdul Nazar Madani Vs State of T.N and anr reported in (2000) 6 Supreme Court Cases 204** Hon'ble Supreme Court held that apprehension of not getting fair trial and impartial inquiry or trial is required to be reasonable and not imaginary based upon conjectures and surmises. It also held that no universal or hard and fast rules can be prescribed for deciding a transfer petition which has to be decided on the basis of facts of each case.

17. Learned advocate Mr Lakhani relied upon the decision of **Gurcharan Das Chadha Vs State of Rajasthan reported in AIR 1966 SC 1418.** It is with regard to law in respect of transfer of cases. It is observed that petitioner is not required to demonstrate that justice, will inevitably fail, but is entitled to a transfer if he shows circumstances from which it can be inferred that he entertains an apprehension and that it is reasonable in the circumstances alleged. In this case there is no circumstance which would indicate that apprehension was reasonable. In the decision of **Pushpa Devi Saraf Vs. Jai Prakash reported in AIR 1992 SC 1133, t**he Hon'ble Supreme Court transferred the case

in the interest of Learned Presiding Officer. In this case I do not find any reason to transfer the case in the interest of Presiding Officer.

18. Learned advocate Mr. Lakhani has also relied upon the decision of **Baljit Singh Vs State of Jammu and Kashmir reported in AIR 1982 SC 1558 : 1982 (1) SCC 501.** In the said decision Hon'ble Supreme Court transferred the case for the convenience of witnesses. In the present case this decision cannot be made applicable. In the decision of **Appeal (cri). No. 321 of 2001 between Rajeshkumar Singh and High Court of Judicature of Madhya Pradesh, Bench Gwalior dated 31.5.07,** Hon'ble Supreme Court while dealing with contempt of court made certain observations with regard to the power of the court. The said observations are in the context of contempt and therefore they are applicable to the facts of the present case. In the **decision of this Court (Coram : H.K Rathod,J) dated 26.6.01 in the matter of Abdul Raoof Alias Raoof, Abdul Kader Shaikh Vs State of Gujarat in Criminal Misc Application No. 2144/01, t**his Court relying upon certain decisions transferred case from one Court to another Court as the witnesses examined by the Court in one case were the same witnesses in another case to be tried by the same judge which was likely to create an impression in the mind of the judge, with regard to the earlier case. The facts of the present case are altogether different and therefore the said decision cannot

be made applicable to the present case.

19. In view of above merely because learned magistrate allegedly insulted the advocate the respondents apprehended that the trial would not be fair and impartial is not genuine, reasonable and justifiable ground for transfer of cases. Cases cannot be transferred only because a judge expressed his displeasure over conduct of an advocate or a litigant. If transfer of cases is made on such allegations it would give wrong signal to the society and would encourage forum shopping. A litigant who feels that he is not likely to get favourable result from a particular Court would to apply for transfer of case showing apprehension of denial of fair trial. This practice cannot be encouraged. Therefore in my view the impugned order is erroneous, perverse and is required to be set aside.

20. In view of above this Revision Application is allowed and the impugned order dated 29.6.2006 passed by learned Sessions Judge, Junagadh in Criminal Misc. Application No. 159/06 is set aside.

21. Looking to the fact that the matter is very old it is expected that the parties shall co-operate with the learned magistrate in conducting the trial. Records and proceedings be sent back.

(Bankim Mehta,J)

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